

Gocat, Inc. and International Union of Operating Engineers, Local 627. Case 16-CA-8232

July 27, 1981

DECISION AND ORDER

Upon a charge filed on December 11, 1978, by International Union of Operating Engineers, Local 627, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 16, issued a complaint and notice of hearing on January 17, 1979, against Gocat, Inc., herein Respondent. Copies of the charge and the complaint and notice of hearing were served on Respondent.

The complaint alleged that Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(3) and Section 2(6) and (7) of the National Labor Relations Act, as amended. The complaint alleged, in substance, that on or about December 7, 1978, Respondent discharged all of its employees and thereafter failed and refused to reinstate them.

On October 30, 1980, the parties executed a stipulation of facts in which the parties waived a hearing before an administrative law judge and agreed to submit the case to the Board for findings of fact, conclusions of law, and Decision and Order, based on a record consisting of the stipulation of facts and the exhibits attached thereto.

On December 19, 1980, the Board approved the stipulation of the parties and ordered the case transferred to the Board, granting permission for the filing of briefs. Thereafter, both the General Counsel and Respondent filed briefs.

Upon the basis of the stipulation, the briefs, and the entire record in this case, the Board makes the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation duly organized under and existing by virtue of the laws of the State of Oklahoma, with an office and mining operation located in Okmulgee, Oklahoma, where it is engaged in the strip mining of coal.

Respondent admits, and we find, that Respondent is engaged in commerce and in operations affecting commerce as defined in Section 2(6) and (7) of the Act. We also find that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION

Respondent admits, and we find, that the Union is a labor organization as defined in Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Facts

The parties' stipulation shows these facts:

A charge was filed by the Union on December 11, 1978, alleging that Respondent discharged 17 employees because of their membership and activities on behalf of the Union. The Acting Regional Director issued a complaint on January 17, 1979. The complaint alleged that on or about November 15, 1978, Respondent through its agents interfered with, restrained, and coerced its employees at its Okmulgee, Oklahoma, facility, in the exercise of the rights guaranteed them by Section 7 of the Act by orally threatening an employee with the loss of his job if said employee discussed the Union with other employees.

The complaint further alleged that on or about December 7, 1978, Respondent discharged all of its employees, "including, but not limited to," and naming 17 specific employees, because those employees joined, supported, or assisted the Union or engaged in other union or concerted activity for the purposes of collective bargaining or other mutual aid or protection. The acts the complaint alleged constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

Respondent's answer of January 27, 1979, admitted that it terminated all employees working at Gocat Mine No. 1, but denied that the terminations were related to union or other concerted activities or that such action constituted an unfair labor practice within the meaning of the Act. Respondent alleged that the terminations were lawful and justified by its legitimate business interests. Respondent filed an amended answer on April 30, 1979, stating that one of the individuals, Jack R. Richy, named in the complaint as a discriminatee, was a supervisor as defined in Section 2(11) of the Act.¹

The General Counsel issued an amended complaint and notice of hearing on September 12, 1980, alleging that Respondent and the Union had entered into a settlement agreement, approved by the Regional Director on June 12, 1980. The settlement agreement provided that Respondent would pay certain amounts of money to named individuals. The amended complaint alleged that Respondent refused to comply with the provisions of the settlement agreement, which agreement had been vacated and set aside by the Regional Director by letter dated September 11, 1980.

¹ The stipulation provides for the deletion of the name Jack R. Richy from the list of names in par. 11 of the amended complaint dated September 12, 1980.

Respondent's answer of September 19, 1980, admitted the allegations with respect to entering into and failing to comply with the terms of the settlement agreement. Respondent continued to deny the allegations, maintaining that the discharges were for good cause and alleging that it offered recall on May 22, 1979, to all except Supervisor Jack Richy.

On October 20, 1980, the General Counsel amended paragraph 11 of the complaint by inserting the name Jerry Wayne Duke as one of the employees allegedly discharged for exercising his Section 7 rights. This was followed on October 30 by Respondent's amended answer including an affirmative defense that the addition of the name of Jerry Wayne Duke on October 20 was time-barred by Section 10(b) of the Act inasmuch as the original charge had been filed on December 11, 1978.

Thereafter the parties entered into a stipulation executed on October 30, 1980, in which Respondent admits to all allegations in the complaint. However, Respondent maintains, and the parties stipulate, that the sole issue before us is whether the amendment to the complaint with respect to the addition of Jerry Wayne Duke is time-barred by Section 10(b) of the Act.

B. Discussion

The General Counsel contends that it was within the Regional Director's permissible discretion under Section 10(b) of the Act for him to amend the complaint on October 20, 1980, to include dischargee Duke. According to the General Counsel, the amendment to the complaint was closely related to the violations alleged in the charge. Therefore, the General Counsel submits that, since Respondent has admitted the violations of Section 8(a)(1) and (3) of the Act, Duke should be included as to the remedy.

Respondent, in support of its 10(b) contention, argues that the charge as filed did not inform Respondent of the nature of the alleged violation as it relates to Duke, thus resulting in prejudice. Therefore, the amended complaint should be dismissed.

It has long been held that where a charge is filed within 6 months after the alleged violations the addition of discriminatees is not barred by Section 10(b) of the Act. The effect of Section 10(b) has been summarized as follows: (1) A complaint, as distinguished from a charge, need not be filed and served within the 6 months and may therefore be amended after the 6 months. (2) If a charge was filed and served within 6 months after the violations alleged in the charge, the complaint (or amended complaint), although filed after the 6 months, may allege violations not alleged in the charge if they (a) are closely related to the viola-

tions named in the charge, and (b) occurred within 6 months before the filing of the charge.²

The stipulated documents in this case show both conditions are satisfied here. Accordingly, the original charge alleges that on or about December 5, 1978, Respondent terminated 17 named individuals at the Gocat Mine No. 1 because of their membership and activities in the Union, thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

Since Respondent admits that it discharged the employees, including employee Duke, because of their union activities and since Duke's discharge occurred at the same time and place as the discharges of the 17 other employees of Respondent, it appears that Duke's discharge was "closely related to the violations named in the charge."³ Moreover, Duke's discharge "occurred within six months before the filing of the charge," thus satisfying the second condition of *Dinion*.⁴

It should also be noted that the charge in the instant case notified Respondent that it was charged not only with specific violations of the Act, but also with "other acts of conduct" which "interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act." Such language has been held to form a "sufficient basis for later specific allegations." Furthermore, the following language appeared in the original complaint and the amended complaint:

On or about December 7, [1978] Respondent discharged all of its employees, including, but not limited to . . .

Thus Respondent was clearly put on notice long before October 20, 1980, of possible additions to the list of dischargees alleged as violative of Section 8(a)(3).

We find, therefore, that the addition of discriminatee Duke to the complaint is not barred by Section 10(b) of the Act and that Respondent's contention that the charge did not inform it of the nature of the alleged violations as to Duke is ill founded.

On the basis of the foregoing finding, and in view of Respondent's admission that it discharged its employees because of their union or concerted activity, as alleged in the complaint, we conclude that, by its discharge and refusal to reinstate Daniel Lee Stark, Gary Hooper, Gary Warren, Dennis Stanfield, Booker T. Mangum, Charles L. Johnson, Elmer Crittendon, Carey Stanfield, Mike Stark, J.

² *N.L.R.B. v. Dinion Coal Co.*, 201 F.2d 484, 491 (2d Cir. 1952).

³ *Id.*

⁴ *North American Rockwell Corporation v. N.L.R.B.*, 389 F.2d 866 (10th Cir. 1968).

R. Fuller, Alan L. Gurtler, Kenneth R. Sherril, Johnny D. Griffin, Johnnie L. Wiley, Don Hale, Ashley Bear, and Jerry Wayne Duke, Respondent violated and is violating Section 8(a)(3) and (1) of the Act.

Furthermore, Respondent has admitted that it had interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act by orally threatening an employee with the loss of his job if said employee engaged in conversations about a union with the other employees. We therefore find that Respondent violated and is violating Section 8(a)(1) of the Act.

IV. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discharged employees Daniel Lee Stark, Gary Hooper, Gary Warren, Dennis Stanfield, Booker T. Mangum, Charles L. Johnson, Elmer Crittendon, Carey Stanfield, Mike Stark, J. R. Fuller, Alan L. Gurtler, Kenneth R. Sherril, Johnny D. Griffin, Johnnie L. Wiley, Don Hale, Ashley Bear, and Jerry Wayne Duke, we shall order Respondent to offer said employees immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions,⁵ without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings that they may have suffered as a result of the discrimination against them. Backpay with interest thereon is to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).⁶

CONCLUSIONS OF LAW

1. Gocat, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

⁵ The General Counsel alleges that the Gocat Mine No. 1 is closed and therefore requests that Respondent be ordered to reinstate the discriminatees at any of its mines in operation at the time of the Board's Order and give the discriminatees the option of choosing the mine location which is most convenient. This allegation is outside the scope of the stipulation, and we leave to the compliance stage of these proceedings the question of what constitutes a substantially equivalent position for purposes of our Order.

⁶ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Member Jenkins would provide interest on the backpay award in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

2. International Union of Operating Engineers, Local 627, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging employees Daniel Lee Stark, Gary Hooper, Gary Warren, Dennis Stanfield, Booker T. Mangum, Charles L. Johnson, Elmer Crittendon, Carey Stanfield, Mike Stark, J. R. Fuller, Alan L. Gurtler, Kenneth R. Sherril, Johnny D. Griffin, Johnnie L. Wiley, Don Hale, Ashley Bear, and Jerry Wayne Duke and refusing to reinstate them, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

4. By orally threatening an employee with the loss of his job if said employee engaged in conversation about a union with the other employees, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Gocat, Inc., Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge because of their union activities.

(b) Discharging or otherwise discriminating against employees because of their interest in, or activity on behalf of, a labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer employees Daniel Lee Stark, Gary Hooper, Gary Warren, Dennis Stanfield, Booker T. Mangum, Charles L. Johnson, Elmer Crittendon, Carey Stanfield, Mike Stark, J. R. Fuller, Alan L. Gurtler, Kenneth R. Sherril, Johnny D. Griffin, Johnnie L. Wiley, Don Hale, Ashley Bear, and Jerry Wayne Duke immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the section herein entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Tulsa, Oklahoma, place of business copies of the attached notice marked "Appendix."⁷ Copies of said notice, on forms provided by the Regional Director for Region 16, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

⁷ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we

have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT threaten you with discharge because of your union activities.

WE WILL NOT discharge or otherwise discriminate against you with regard to hire or tenure of employment because of your interest in, or activity on behalf of, a labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by the Act.

WE WILL offer Daniel Lee Stark, Gary Hooper, Gary Warren, Dennis Stanfield, Booker T. Mangum, Charles L. Johnson, Elmer Crittendon, Carey Stanfield, Mike Stark, J. R. Fuller, Alan L. Gurtler, Kenneth R. Sherril, Johnny D. Griffin, Johnnie L. Wiley, Don Hale, Ashley Bear, and Jerry Wayne Duke immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of earnings they may have suffered by reason of our unlawful discharge of them, with interest.

GOCAT, INC.